BOOK REVIEWS.

FRANCIS GOERTNER, *Editor-in-Charge.*

EQUITY AND ITS RELATIONS TO COMMON LAW. By WILLIAM W. BILLSON. Boston: BOSTON BOOK CO. 1917. pp. xii, 226.

This volume is a study of legal development comprising eight essays dealing with various phases of English equity as an ameliorating system of substantive law. The author's main thesis is that equity was not, as some writers have contended, restricted to the relief of such common law defects as were due to inadequacies of procedure, but that it was and is a true system of substantive law conflicting at many points with the rules of the common law because of the different standards of legal morality developed by the two systems. While the writer adopts a more elaborate classification than is here indicated, he points out that equity developed a system of substantive law differing from the legal system in three main directions which were not mere corrections in legal procedure. They were: (a) a more liberal interpretation of documents than that adopted by law; (b) the development of the doctrines of fraud and mistake, and a more extensive application of them than was given to them by the courts of law; (c) the development of the doctrine that equity might restrain the unconscientious exercise of a legal right on moral grounds.

When one reflects that equity often restrained the prosecution of actions at law, and that the exercise of a large part of its jurisdiction involved for all practical purposes a negation of the rights of the legal owner, it seems extraordinary that any writer should ever have asserted broadly that there was no conflict between the doctrines of law and equity, and that any one should have found it necessary or desirable to have written a book to assert the contrary doctrine. Certain statements, however, of Professor Langdell and Professor Maitland, which have been interpreted, with doubtful accuracy, as going to the extreme length of denying any inconsistency between the doctrines of law and equity, have of late been the occasion of much legal writing of which this book is the most recent and extended example. Indeed, the statement that equity and law do not conflict is a statement often made correctly with reference to the law administrative agencies of the two systems rather than to their conflicting doctrines. Equity did not restrain a judge or officer of the law courts, nor, after the subsidence of the famous controversy between Coke and Lord Ellesmere, did the law courts attempt to interfere with suitors in equity. Nor, indeed, did equity deny the operation of rules of law. It sought only to counteract them by compelling the defendant to relinquish the benefits of those rules in accordance with its decree. Until this decree became operative neither courts of law nor equity denied the operation of rules of law to define the substantive rights of the parties. In this narrow sense law and equity did not conflict; but that in a broader sense there was a conflict in that equity often adopted a different doctrine than

that of the law courts and based its action upon it, does not now seem fairly open to question.

In his examination of this subject, the author traces in considerable detail the development of the independent doctrines of equity in matters of interpretation, in the law of waste, forfeiture, the defective execution of powers, marriage settlements, merger, and the doctrine of equitable conversion. Separate chapters are devoted to the subjects of fraud, and of uses and trusts. In dealing with these topics he stresses particularly the substantive character and the superior morality of those doctrines of equity which conflict with legal rules.

In thus emphasizing this conflict between the substantive rules of law and equity, one gains the impression that the author does not give sufficient recognition to the part which procedure played, not only in stimulating the development of equity's conflicting theories of substantive rights, but in making them effective by the process of counteraction of legal rules through the operation of the decree *in personam*. This process was not a thinly disguised fiction by which the chancellor attempted to conceal the fact that he was setting up a system of law conflicting with but ultimately controlling the doctrines of common law. It was a real operative fact which made the decree in equity all-powerful over legal rules and judgments when it was rendered and obeyed, but which, on the other hand, left substantive legal rights unaffected until the rendition of the decree.

It is idle to suppose that, taken as a whole the chancellors possessed an intelligence and morality superior to that of the judges, or that the superior morality of our equity is attributable to any such differences in the intellectual and moral qualities of those who administered the two systems. We must look rather for the explanation of this difference in the superior powers possessed by the chancellors, which enabled them to give effect to their ideas of conscientious conduct by circumventing the legal rules which they did not deny. To the law courts no such procedure was open. Thus, while the law courts determined rights existing in the plaintiff according to established rules, courts of equity proceeded on the theory that they were imposing a personal obligation on the defendant to surrender some of his legal rights in favor of the plaintiff. That the same idea persists in modern jurisprudence is revealed by the statement that the law judgment dates from the date of the action and the equity decree from the date of its rendition. The distinction is one which has not lost its significance even with the merger of the two systems.

The author suggests at the outset that the distinction between the law and equity systems has in a sense been "worn out". To the extent that law has largely taken over equity's view of interpretation and adopted many of its doctrines this is both true and fortunate. But there will always be the need of the two forms of relief, the one typified by the relief afforded by a legal judgment, the other typified by the relief afforded by the equity decree *in personam*. Whatever the form of procedure by which these results are accomplished, or the name given to it, and whether administered by the same or distinct courts, the distinction itself is one of substance and it is not outworn.

The theory of modifying the ultimate consequences of an established legal rule by directing the exercise of it in a particular manner has been the most prolific source of law improvement in the entire history of

English law. The departure from the established rule of law which was impossible for the judge presented no difficulties to the chancellor, who accepted the rule but restrained the defendant from taking the benefit of it on moral grounds affecting the conscience of the defendant. A study of the decisions of courts of equity in more recent times convinces one that this is still one of the most important avenues of law improvement. Moreover, one of the most beneficent aspects of equity has been its discretionary jurisdiction and this was made possible by its procedure *in personam* rather than by any moral superiority of its judges or of its doctrines of substantive law. It was the elasticity and adaptability of the equity which gave greater opportunity for the exercise of discretion than was possible in an action brought merely for the recovery of a money judgment. So long, therefore, as the courts retain a power in special cases, where the right of money recovery is inadequate, to direct specific things to be done, thus giving full play to the restriction of general rules by the personal judgment, and to the exercise of judicial discretion, the fundamental distinction between law and equity will not be outworn and our system of law will have retained its most potent agency, apart from legislation, for administering justice adapted to the needs of special cases and in harmony with an enlightened morality.

A part of the concluding chapter on uses and trusts is devoted to an elaboration of the view that the right of the *cestui que trust* is a property right in the trust *res*, or, as is sometimes said, a right *in rem* in the trust property. Indeed the author goes so far as to say that the right of the *cestui que trust* is not a right *in personam* He demonstrates this (p. 218) in the following manner:

> "If the right of the *cestui que trust* were really a right *in personam*, it would follow of course that in equity as well as at law all elements of ownership, both formal and beneficial, must be vested in the trustee, and that upon the death of the *cestui que trust* without heirs, they must remain in the trustee, free from the extinct trust obligation. The acknowledged rule is the contrary of this: and proceeding upon the principle that only the formal elements of title are in the trustee, the beneficial elements under such circumstances are held to escheat to the state as unowned property."

The author admits that such is not the rule under the English law in the case of real estate, and that upon the death of the *cestui que trust* of real estate without heirs, the trust is terminated and the trust property is held by the trustee for his own benefit. But he relies on the rule, in the case of personal property, that the right of the *cestui que trust* who dies without next of kin passes to the Crown or the State as *bona vacantia*, as supporting his proposition.

By a similar course of reasoning one might prove that a bond or promissory note was not a right *in personam*, because on the death of the obligee or payee without heirs or next of kin his rights would vest in the Crown or the State.

There are of course many difficulties in maintaining consistently the proposition that the right of the *cestui que trust* is a property right in the trust *res*. The author overcomes the difficulty of the rule

that the *cestui* cannot claim the trust property which has escheated upon the death of the trustee without heirs, by asserting that this rule would have been changed had the rule not ultimately been changed by statute. The difficulty that the trustee may alone maintain an action against the trespasser or disseisor is brushed aside by reference to the cases in which the *cestui que trust* is allowed to join the trustee with the tort feasor and secure relief where the trustee in violation of his trust refuses or neglects to act. Other more troublesome difficulties are not referred to, such as, for example, that the infant *cestui que trust* is generally barred by the Statute of Limitations from asserting rights in trespass, trover, or for dissesin, whenever the trustee is barred, although the Statute of Limitations does not run against the claim of an infant *cestui* against third persons during his infancy where the wrong complained of is a breach of trust.

Nor is any explanation offered for the result reached in those cases in which third persons are held responsible in equity because they have assisted the trustee in a breach of trust without, however, actually interfering with or acquiring the trust *res*; or of the rule of law that the purchaser of trust property with notice who converts the trust property into other property is made a constructive trustee of the newly acquired property; or of those decisions in which the court has compelled those who acquire trust real estate located in a foreign jurisdiction, to hold the property for the injured *cestui*. It would seem that these and many other cases of liability of third persons to the *cestui que trust* can be explained only on the theory that the right of the *cestui que trust* is a right *in personam* against the trustee, but that the right of the *cestui* against the trustee gives rise to a right *in rem* with respect to third persons, just as a right in a contract is a right *in rem* with respect to third persons regardless of the question whether the obligation of the obligor is an obligation with respect to property or not. The significance of this view lies in the fact that equity imposes on an indefinite number of persons, not purchasers for value, the equitable duty of refraining from conduct which aids or makes more effective the trustee's breach of his obligation to the *cestui*, and which thus amounts to an interference with the plaintiff's right *in personam* against the trustee. Such a conception of the right of the *cestui que trust* gives full scope to the application of those doctrines of conscientiousness which have characterized the development of equity, whereas the tendency to be noted in this book of ascribing to equitable rights the character of a property right in the *res* held subject to it, tends more and more to identify them with the fixed rules of property in which the emphasis is laid upon the formal right of the plaintiff rather than the moral duty of the defendant. Perhaps no better illustration of the truth of this statement could be found than the judgment in *London County Council* v. *Allen* ([1914] 3 K. B. 642) in which the court rendered what one of the judges referred to as a "regrettable" decision in holding that the plaintiff who had sold land subject to a restrictive covenant was not entitled to restrain the defendant, a purchaser from the covenantor with notice, who was proceeding in violation of the terms of the covenant. The decision was regrettable only because the court attempted to liken the plaintiff's equitable right to a property right

in rem in the land, which according to settled rules had no validity against the subsequent purchaser of the land. Had the emphasis been placed on the defendant's duty to refrain from any conduct interferring with the plaintiff's equitable right *in personam* upon the covenant, a more fortunate result would have been reached, and one more consistent with the doctrines which have characterized the decisions of courts of equity.

There are in the book many statements of minor importance which will not win ready assent; such, for example, as the statement (p. 82) that a "contract for the sale of foreign lands cannot be specifically enforced against the subsequent purchaser although he bought with notice of the contract." (Cf. 17 Columbia Law Rev. 498, n. 89); the statement (p. 114) that equity gave effect to assignments of choses in action by presuming or inferring executory agreements to assign or convey; that the true basis of the jurisdiction in specific performance of contracts is that equity regards as done what ought to be done; that in the case of a contract for the sale of an ordinary chattel not specifically enforceable a trust will be implied in favor of the vendee if the purchase price has been paid.

There is a tendency in the book to over-generalize and to speculate upon what the chancellors might have done under other conditions which never existed (as for example p. 177) and at times the author states as though it were something novel or profound, matter which has long been the stock in trade of legal educators. (*Vide* his treatment of the well-recognized historical fact that rules of law tend to survive the causes which gave them birth, p. 28). No reference is made to a number of law review articles in which views similar to those advanced by the author are discussed. (See for example: 17 Columbia Law Rev. 269; 17 Columbia Law Rev. 467; 11 Michigan Law Rev. 537; 26 Yale Law J. 710, 767.

Despite these minor criticisms, the book gives much evidence of diligent study and ripe scholarship. Especially interesting is the manner in which it brings in juxtaposition many doctrines of equity not often studied from the point of view of comparative law. The book should be read by students and teachers of equity, and will undoubtedly provoke much thought and discussion. It is a hopeful sign that a member of the bar who has devoted most of his life to practice should have found the time and inclination to have carried on a study of law on its historical and philosophical side and to have given the fruits of his labors to his professional brethren.

Harlan F. Stone.